# No. 10,550

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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THOMAS H. WINGATE, as Receiver in Equity for Pacific Empire Holdings, Incorporated (a corporation of the State of Delaware),

*Appellant,*

vs.

PETER BERCUT, HENRI BERCUT, M. MAFFEI and L. R. ARNOLD,

*Appellees.*

## BRIEF FOR APPELLEES PETER BERCUT AND HENRI BERCUT.

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GEORGE M. NAUS,
Alexander Building, San Francisco, California,
LOUIS H. BROWNSTONE,
Russ Building, San Francisco, California,
*Attorneys for Appellees Peter Bercut and Henri Bercut.*



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*May it please the Court:*

The brief for appellant violates your Rule 20(d), fourth sentence, which plainly requires that "In equity * * * cases, and at law when findings are made, the specifications state *as particularly as may be* wherein the findings of fact and conclusions of law are alleged to be erroneous"; at least there are violations in what he calls, at his pages 60 and 61, Points 4, 5, 6 and 9. (See *Berry v. Earling,* 9 Cir., 82 F. 2d 317.)

Also, he misconceives the nature and scope of the appellate review open to the Court: At his page 120, "Point No. 9(a)", he seems to labor under the view that only

the findings under the equity count are open for review. The case was tried without a jury, which opens the whole case under Rules of Civil Procedure, Rule 52(a), giving his appeal a broader scope than he apparently thought it had. On the other hand, although what he asks of the Court is a weighing of the evidence, his statement of the facts is incomplete, one-sided, highly colored, inaccurate, and at best no more than a selection merely of those portions of the evidence deemed by him most favorable to himself, in disregard of credibility, conflicts in testimony, and all else. The appellant simply ignores controlling rules of review: Rule 52(a), third sentence, reads:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The first citation in the advisory committee's notes thereunder is *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.,* 8 Cir., 204 Fed. 166, wherein at page 177 it was said:

> "Each of the findings of fact from which the court deduced this conclusion is vigorously assailed by each of the parties to this suit in oral argument and in briefs which contain many hundreds of printed pages. Each of them has been carefully examined, with the aid of these arguments and briefs, and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony, and many of them from evidence very evenly balanced. These findings, therefore, fall far within the familiar rule that, where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious

error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand. Coder v. Arts, 152 Fed. 943, 946, 15 L.R.A. (N.S.) 372; Tilghman v. Proctor, 125 U.S. 136, 31 L. Ed. 664; Kimberly v. Arms, 129 U.S. 512, 32 L. Ed. 764; Furrer v. Ferris, 145 U.S. 132, 134, 36 L. Ed. 649."

Prior to Rule 52(a), this Court repeatedly restated the rules with respect to oral testimony and conflicts of testimony, e.g.: *Exchange National Bank of Spokane v. Meikle,* 61 F. 2d 176, 178-9; *National Reserve Ins. Co. v. Scudder,* 71 F. 2d 884, 887-888; *Neukom v. North Butte Mining Co.,* 84 F. 2d 101. And it has restated them since Rule 52(a):

"The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. v. Silver King C. M. Co., 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571.

The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S. C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. Guilford Const. Co. v. Biggs, 4 Cir., 102 F. 2d 46, 47.

As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of wit-

nesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."

*Wittmayer v. U. S.,* 118 F. 2d 808, 811;
*Guilford Const. Co. v. Biggs,* 102 F. 2d 46, 47;
*Cherry-Burrell Co. v. Thatcher,* 107 F. 2d 65, 69;
*Weber v. Alabama-California Gold Mines Co.,* 121 F. 2d 663, 664 (no conflict; question of credibility);
*Stimson v. Tarrant,* 132 F. 2d 363, 365.

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## I.

### STATEMENT OF THE CASE.

The whole of the brief for the appellant, from the beginning to the end of it, and under whatever heading or subheading his argument proceeds, is based upon a false major premise, i.e., a false assumption that what we bought at the fair price of $35,000 was at the time worth $300,000. Remove that false premise of a value greater than $35,000 and the foundation of appellant's brief is gone.

Certainly, if we did buy at $35,000 something that at the time was worth $300,000, such a gross inadequacy of price would have shocked the conscience of the judge who presided over the trial in the Court below, and would invalidate the transaction in any Court, trial or appellate, on any theory. No Court would have any difficulty in finding some theory of invalidation, whether Bercut was at the time of the transaction a director or not, although the fact is that he was not.

Another false major premise of the appellant is the false assumption that Bercut was one of the managers of the corporation, when in fact Arnold and Maffei were the sole managers of it.

Rule 20(3) of this Court contemplates from an appellee no "Statement of the case" excepting as to points of controversy with the statement by an appellant, and we therefore turn to the principal matters in which the statement presented by the appellant is controverted by us:

**(a) Prior to the transaction of January, 1941, Peter Bercut had never been the manager of either Pacific Empire Holdings, Inc., Pacific Empire Corporation, or Merchants Ice and Cold Storage Co.**

At his pages 14 and 15 appellant states: "all these companies, then under the active management and supervision of the defendants Maffei, Arnold and Peter Bercut"; "the defendants Maffei, Arnold and Peter Bercut, ran, managed and supervised all of these companies". Appellant cites no supporting page of the record. There is no support. The statement is true as to Maffei and Arnold; it is untrue as to Peter Bercut. Bercut was not a manager. The trial Court found, Finding III, at R. 944:

> "Said M. Maffei and L. R. Arnold were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent of its Directors actively managed, controlled, carried on and conducted its business and affairs. During all of said time, defendant, Peter Bercut, took no active part in the management or direction of the affairs of said corporation or the preparation of any finan-

cial statements in connection therewith or appertaining thereto."

In none of the "Points" of appellant's brief, under "Part VII, The Argument", do we find any attack upon the evidentiary support of the quoted finding. The finding comes to this Court as an established fact. Appellant simply ignores the finding and assumes the contrary. The finding is supported by uncontradicted evidence. Maffei testified:

"Q. [by Mr. Scampini] Who actually managed the affairs and business of the Pacific Empire Holdings, Inc.?

A. Myself and Mr. Arnold, both." [R. 73.]

"Q. [by Mr. Scampini] Who was really operating and managing this set-up?

Mr. Naus. What do you mean by 'this set-up'?

Mr. Scampini. Pacific Empire Holdings and Pacific Empire Corporation.

A. Both I and Arnold." [R. 186.]

"Q. [by Mr. Naus] Now, down there at 26 O'Farrell street, you had your offices, as I understand it.

A. Correct.

Q. And all of these corporations occupied these offices for the same purpose?

A. Correct.

Q. There was Pacific Empire Holdings?

A. Right.

Q. And formerly the Calitalo was there?

A. Yes.

Q. And the Pacific Empire Corporation?

A. Correct.

Q. And the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And the laundry company, what was its name?

A. Laundry Service.

Q. And there were some others from time to time?

A. Yes.

Q. All being run by the same two executives, Arnold and Maffei?

A. Yes.

Q. With the same bookkeeper, Heer?

A. Yes.

Q. Now, in handling the affairs of these various corporations through that staff, did you handle the affairs of any one of these corporations in any different routine manner than you handled the affairs of any other?

A. Mr. Arnold handled pretty nearly all of the financial affairs of the corporations, of all of the corporations." [R. 287.]

"Q. [by Mr. Naus] In other words, from the time Vincent, Stratton and McInerney went out of the management you and Mr. Arnold have been in the saddle there ever since until the receiver came in, running these corporations to suit yourselves, haven't you?

A. Well, we tried to run them to the best of our ability.

Q. I know to the best of your ability, but you and Arnold decided just what was to be done and did it, isn't that correct?

A. Yes.

Q. That was during all of the time after Vincent and Stratton went out and left you in there?

A. Yes.

Q. That ran over a period, let us say, of ten years before the sale to Bercut?

A. About nine or ten years." [R. 292.]

"Q. [by Mr. Naus] Now, Mr. Maffei, as a matter of fact, in the handling of these various corporations—the Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice & Cold Storage Company, and the laundry company, and so on,—you and Mr. Arnold took the cash that any of these corporations had on hand at any time and used it as you pleased for the use of any of the other corporations, didn't you?

A. That is right.

Q. In so far as yourself and Mr. Arnold were concerned, these corporations had four different pockets, and you took it out of one pocket of the four and put it into any one pocket that you wanted?

A. We used one corporation as the holding company." [R. 295.]

Mr. Arnold, called by the plaintiff as a witness, testified:

"Q. [by Mr. Goodman, on cross-examination] The Pacific Empire Holdings Company was, as its name implies, a holding company?

A. That is correct.

Q. You didn't have to conduct any business in the Pacific Empire Holdings Company except to watch out for these important investments that the Pacific Empire Holdings Company had?

A. Well, it wasn't an operating company, if that is what you mean.

Q. And the sole business of that company was to safeguard and watch out for and take care of the investments that the company had? Isn't that right?

A. Yes, supervise its operating companies.

Q. And were you the man who was in the nature of manager of the affairs during that period of time?

A. Well, I do want to say this right there, that I more or less managed the affairs. It was all under

the complete—under the supervision of Mr. Maffei; I mean everything that was done, he knew about." [R. 763-765.]

"Q. [by Mr. Goodman] And it is a fact, is it not, that you did, subject to consultation with Mr. Maffei, actually conduct what business affairs there were of the Pacific Empire Holdings?

A. I didn't conduct all of those things, no. In the Holdings Company Mr. Maffei and I—there were certain things that he was qualified to do and did, and certain things that I was more qualified to handle, and I would handle them.

Q. What were the things that Mr. Maffei was qualified to do, the best of your recollection?

A. Well, in things directly affecting the holding company.

Q. What, for example?

A. Well, for instance, our backing, through the Pacific Empire Corporation—he was active with the bank as our representative; he spent a lot of time around the Merchants there before I was president and while I was." [R. 766.]

**(b) The District Court was not bound to accept as true the "minutes" of Pacific Empire Holdings, Inc., or Pacific Empire Corporation.**

The "minutes" of the two "Pacific" companies[1] are substantially worthless. Arnold[2] "dictated the minutes to the secretary and she would write them up", R. 273. This Court need only read the fencing and occasionally evasive answers of Maffei on cross-examination, over the twenty pages, R. 270 to 290, to see that meetings were never

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[1]The board meetings of Merchants Ice and Cold Storage Company were *actually* held, R. 288-289, thereby differing from the "Pacific" companies.

[2]Maffei was not the author of any of the minutes, R. 273.

actually held, and that the "minute books" of the "Pacific" companies are little, if anything, more than paper memorials of Arnold's occasional excursions into fantasy, mere window-dressing of the management by him and Maffei. The appearance and demeanor of Maffei during the cross-examination recorded in those pages were such as to cause the trial judge to indicate that Maffei was simply wasting the time of the Court in his verbal feintings and evasions, R. 283-284. Mr. Scampini (one of the attorneys for appellant) had been attorney for the corporations until September, 1936, when he resigned "because they had no meetings", R. 284-285. His letter[2a]

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[2a]The letter is on the letterhead of Hettman & Scampini, Counselors at Law, Bank of America Building, 485 California Street, is dated August 17, 1936, and is addressed to Pacific Empire Corporation, 26 O'Farrell Street, San Francisco, California. It reads:

"Gentlemen:

You may consider this as my resignation as a Director and counsel for Pacific Empire Corporation.

I have been constrained to make this decision, because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the company's business, which leads me to the conclusion that for the best interests of the company I should disassociate myself with it to the end that any responsibility attaching to and arising out of the management of the business of the company shall rest on the proper persons. I must observe, however, that **since the formation of this company not a single directors' meeting has ever been held,** and all decisions made by the management involving the company's properties have been made solely on the responsibility of its officers, without any ratification whatever on the part of its Board of Directors.

I, therefore, must disclaim any responsibility whatever for any matter or thing done by the management in the premises.

My office has been acting as counsel for the company since its organization, and in view of the fact that no settlement has ever been made with me looking towards the fixing of any compensation for my services so far, I suggest that you designate one of your officers to meet with me in an effort to arrive at an amicable settlement in that connection.

Yours very truly

(Signed) A. J. Scampini"

of resignation purported to have been accepted at a "meeting of September 25, 1936", but even *that* meeting never occurred in fact:

> "Q. [by Mr. Naus] Did you actually accept Mr. Scampini's resignation at a meeting that was actually held?
>
> A. No.
>
> Q. In other words, the minutes purporting to accept his resignation are minutes of a meeting that never occurred, is that right?
>
> A. That is right." [R. 284.]

And the practice did not stop there. No meetings were held after he resigned:

> "Q. [by Mr. Naus] Well, from the time he resigned, onward from there, in the future, did you actually hold meetings?
>
> A. After he resigned?
>
> Q. Yes.
>
> A. We had no meeting." [R. 286.]

**(c) Arnold and Maffei, although aligned with us in the pleadings, are in reality aligned with the plaintiff.**

Maffei and Arnold knew perfectly well that they had made an arm's-length transaction with the Bercuts in January, 1941, and for the greater part of two years it never occurred to them that the transaction was open to attack. "I never had that in my mind at any time," said Maffei, R. 314; Arnold, R. 816-823. "Out of a clear sky," R. 823, eighteen months after the Bercut transaction, Maffei and Arnold received this letter of July 16, 1942, from Mr. Thomas H. Wingate, attorney, Wilmington, Delaware, R. 424, 823:

"July 16, 1942

Pacific Empire Holdings, Inc.
26 O'Farrell Street
San Francisco, California
Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders' derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation's books and records.

I am reluctant to resort to these extraordinary remedies without giving the management an opportunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,
Thomas H. Wingate"

Maffei and Arnold at once went to Mr. Scampini for advice, R. 816-823, and in the latter's office, R. 818, there was originated among the three an arrangement under which Mr. Wingate's threatened attack upon the management (Maffei and Arnold) was deflected to Bercut, resulting in Maffei and Arnold as nominal defendants being called by Mr. Scampini as the principal witnesses for the plaintiff. This is how it was done: On July 27,

1942, the eleventh day after the date of Mr. Wingate's letter, Mr. Scampini telegraphed to Mr. Ivan Culbertson, another Wilmington, Delaware, attorney, to "see if you can talk Mr. Wingate into deferring any action until I have looked into this matter and reported to you", R. 425. Mr. Culbertson replied by telegram of July 30, 1942, that he had done so, R. 426. On August 2, 1942, Mr. Scampini outlined his scheme in a long letter to Mr. Culbertson, R. 426-433. Of Maffei and Arnold, he said *inter alia,* R. 426-427:

> "Since my wire to you of July 29 and your reply of July 30, with respect to the above subject matter [Re: Pacific Empire Holdings, Inc.] I have been engaged almost continuously in conferences with the officers of the corporation, all of whom are fine men but who, unfortunately, have an impossible task."

Therein, he further stated, R. 429:

> "The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction."

He suggested a receivership, but cautioned, R. 430:

> "Any receiver of this corporation so appointed should be what we lawyers understand as a 'friendly receiver'."

He then stated that he was a creditor on an unpaid note for $500, and an owner of 3263 shares of stock, R. 430, and then stated his plan, R. 431:

> "I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tan-

zer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint, alleging insolvency or imminent threat of insolvency," etc.

He added, R. 431:

"I can prepare the form of complaint for you, knowing as I do the history of the organization. I would then file the complaint and serve it upon Corporation Trust Company, its resident agent. The Board of Directors here would call a special meeting and adopt a resolution consenting to the appointment of a receiver. The receiver then could designate an agent to represent him here in California, in accordance with Section 4407 of your Revised Code of 1935. I, as such agent, or anybody else appointed as such agent, could take possession of the local offices and represent the receiver in California. Under our decisions a receiver appointed by the courts of a sister state need not be appointed ancillary receiver in order to be entitled to prosecute actions in the courts as such receiver."

After casually mentioning that he thought his scheme should result in enabling the corporation to "pay a good fee to the receiver and its attorneys, etc, etc.", R. 432, he concluded, R. 433:

"What I want to know from you is can you handle it along the foregoing suggested lines? Do you know Wingate well enough, or anybody else, to arrange with with him to represent the plaintiffs in filing the complaint while you appear as attorney for the corporation in consenting to the appointment of a receiver, and do you think that you can have the Chancellor appoint the proper receiver?"

August 6, 1942, Mr. Culbertson telegraphed this reply, R. 433-434:

> "I have studied carefully your letter of August 2. Your plan feasible and can work out on suggested lines. You should move rapidly as Wingate insisting on going ahead with his complaint. Suggest Wingate for receiver. He will cooperate. Essential you send five hundred dollars to assure carrying out of plan and payment of costs and expenses. Assign your note at once to Tanzer and your stock to Elizabeth Wilhelm.[3] Suggest you send complaint at once as I cannot hold situation here indefinitely. Regards."

As part of the plan, R. 431, a "meeting"[4] of the board on August 20, 1942, adopted minutes prepared in advance by Mr. Scampini, R. 775, a "certified copy of minutes" was transmitted by Mr. Scampini's letter of August 22, 1942, to Delaware, and the consent receiver, Mr. Wingate, was appointed on August 31, 1942, R. 20-30. The present complaint against Mr. Bercut was filed on October 20, 1942, R. 27.

Rebecca Tanzer and Elizabeth Wilhelm were strangers to Arnold and Maffei, R. 822.[5] If there be any conspiracy

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[3]That is the way it was done: R. 20, "In the Court of Chancery of the State of Delaware, in and for New Castle County, Rebecca Tanzer and Elizabeth Wilhelm, Complainants, v. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Defendant. Bill for Receiver."

The bill of complaint and an answer admitting its allegations, were filed August 31, 1942, and a consent receiver appointed forthwith on that day, R. 20-23.

[4]Mr. Webb Richards, one of the directors, testified that no meeting actually occurred, R. 641.

[5]*U. S. v. Manton,* 2 Cir., 107 F. 2d 834, 848, col. 1:

> "It is not required that each of the conspirators shall participate in, or have knowledge of, all its operations. He may join at any point in its progress and be held responsible

reflected by the record at bar, it is not the one that the "fine men" (R. 426-427, Scampini letter of August 2, 1942) Maffei and Arnold concerted with the "receivership" group in alleging, R. 11, between Arnold, Maffei and Peter Bercut, because the trial Court found, Finding VII, at R. 949, that such a conspiracy never existed. The only "conspiracy" shown by the record is the one between Maffei, Arnold, and the Delaware receivership group.

**(d) The value of the shares of Merchants Ice and Cold Storage Company sold to Bercut did not exceed $35,000.00.**

Finding VII, at R. 948, is simple and perfectly clear:

> "The price paid for said shares, to-wit, the sum of $35,000.00, was a fair, reasonable and proper price for said shares. * * * the shares * * * were reasonably worth a sum not in excess of $35,000.00."

The brief of appellant is strangely lacking in the candor due the Court in an attack upon a finding; he wholly suppresses the testimony of some witnesses which clearly supports the finding. This is how the appellant's brief goes at it: at his page 5 he points out that his complaint "alleged"[6] a value of "not less than $1,000,000.00"; at his next page, page 6, he states cost "was about $400,000.00"; he then states, page 32, a book value of

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for all that may be or has been done. Allen v. United States, 7 Cir., 4 F. 2d 688, 692; Baker v. United States, 4 Cir., 21 F. 2d 903, 905; Rudner v. United States, 6 Cir., 281 F. 516, 519; Commonwealth v. Anderson, 64 Pa. Super. 427."

[6]As seen, supra, the complaint grew out of the Delaware correspondence, among which is Mr. Scampini's letter of August 2, 1942, R. 426, which mentions a value of $250,000, R. 429. By the time the complaint was drawn the amount was generously **watered** into an allegation of $1,000,000.00!

$669,363.47;[7] he then quotes at his page 36 testimony of his value witness, Morrish,[8] that the stock was "worth about $200,000.00 to $250,000.00, somewhere around there".

Mr. Morrish testified from a valuation memorandum that he had prepared (printed at R. 471, Defendants' Exhibit E), from which he had reached a conclusion that the preferred stock was worth $10.00 a share, and the common stock $2.80 a share. "I considered", he said at R. 460, "the preferred stock was probably worth its par value of $10.00 a share"; and that, he said at R. 461, "left around $2.80 a share value for the common". On cross-examination he stated his valuation method of the common stock as follows, R. 477:

> "Q. [By Mr. Naus] Then according to your answers to Mr. Scampini as to the value of the common stock per share, you reached that figure—what was it?
>
> The Court. $2.80.
>
> Mr. Naus. Q. $2.80. Do you have that in mind?
>
> A. Yes.
>
> Q. You reached that by a method of calculation of what you deemed to be the liquidating value of the assets minus liabilities and then divided that by a certain number of shares?
>
> A. That is correct.
>
> Q. Is that the method?
>
> A. That is right.
>
> Q. Is that the way you get this?
>
> A. Yes."

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[7]12,495 shares of preferred, $123,456.66; 65,863 shares of common, $545,906.81. Appellant's Brief, p. 32.

[8]Morrish was fired, along with Maffei and Arnold, from the payroll of Merchants Ice, by Bercut, immediately upon the management of Merchants Ice being taken over by the latter. R. 349, 351. Arnold had been drawing $500 or $600 a month, R. 227; Morrish, $200, R. 454.

He reached the value of $2.80 a share for the common stock by the following calculation, R. 471-472:

"My valuation assets ..... $1,576,059.97
All liabilities ..... 859,826.96

Net value ..... $ 716,233.01
Preferred Stock at book[9] ..... 416,150.00

Balance for Com. Stock ..... $ 300,083.01
Common Stock outstanding:
107,118 shares. Taking my value of assets,
300,083÷107,118 or $2.80 per share."

Using round figures he reached the following conclusion in his valuation report, R. 472:

"Value of Pac. Empire Holding sold to Bercut:
12,000 shares Preferred at $10 ..... $120,000
65,000 shares Common at $2.80 ..... 184,000

Total value ..... $304,000"

Until he was cross-examined he had overlooked the fact that the preferred stock, par $10.00, was a 7% cumulative preferred, on which no dividend had been declared since 1927, so that at the time of the sale to Bercut in 1941 there were fourteen years of cumulated arrears, or $9.80 a share arrears, i.e., a total of $19.80 ($10.00 plus $9.80) ahead of the common, R. 478-479. He thereafter admitted:

"Q. [By Mr. Naus] Either as a going concern or as a liquidating concern the articles of incorporation that we have in evidence show that the preferred has the priority on liquidation, so it has a preference either way, can't you see, Mr. Morrish? So that instead of assigning $10 a share to the preferred you

[9]He corrected "book" to read "par", R. 460.

must assign $19.80 to the preferred as of the time of the deal in figuring out the liquidating value of the common stock.

A. That is right.'' [R. 479.]

''Q. [By Mr. Naus] But now, as I have pointed out to you, on your direct examination you have only assigned $10 a share to the preferred, and since I have provided you with additional information as to which there is no dispute between me and counsel, you must assign $19.80 to preferred instead of $10; that using your method, but correcting the figure as to preferred, that that means on the liquidating value the common stock was worthless; isn't that the fact?

A. I have not figured that out.

Q. Would you do so, please, or can't we do it this way, by a question. Let me reframe it. Using your method of $10 a share you finally end up with some figure of some $200,000-odd and you divide 107,000 shares of common into that, don't you?

A. Well, if you value the preferred at $20 a share there would be nothing left for the common stock; that is right.'' [R. 481.]

He accordingly shifted his valuation into the preferred stock, R. 480:

''Q. [By Mr. Naus] Then can't you see, Mr. Morrish, instead of the common stock having a liquidating value of $2.80 at the time of this sale, it was worthless at the time of the sale?

A. The value was still there in the preferred stock owned by the Pacific Empire.''

In the last analysis the valuation testimony of Mr. Morrish must be tested through his valuation of the assets of Merchants Ice at a total of $1,576,059.97, which he broke down as follows, R. 471:

| | |
|---|---|
| "Land | $700,000.00 |
| Building [and machinery and equipment] | 750,000.00 |
| Real Est. | 20,000.00 |
| Cash | 6,415.57 |
| Accts. Rec. | 92,144.40 |
| Bottles | 7,500.00" |

The trial judge was perfectly justified in considering the item "Land, $700,000.00", as a gross overvaluation. We called as a witness Mr. Louis T. Samuels, well qualified,[10] on the value of the lands in question, and the buildings thereon. They consist of eight parcels described in detail at R. 645-651, and listed in detail in Defendants' Exhibit M, at R. 657-660. We summarize the land value testified to by Mr. Samuels, R. 657-658:

| Parcel | Land Value |
|---|---|
| 1 | $ 19,850 |
| 2 | 18,900 |
| 3 | 18,750 |
| 4 | 14,500 |
| 5 | 4,500 |
| 6 | 4,750 |
| 7 | 2,000 |
| 8 | 75,625 |
| Total | $158,875 |

The total square footage of the whole is 154,000 square feet, or an approximate value of $1.00 a square foot, R. 654. That valuation was corroborated by proof of ten separate and comparative sales of similar lands at arm's length in the open market between willing and uncompelled buyers and sellers at or near the time in question, R. 660-662, including the following substantial buyers and

[10]His clear qualifications appear at R. 643-644.

sellers buying and selling on an approximate basis of $1.00 a square foot:

Hastings Estate
John Rosenfeld Sons
Beronio Estate
United States Government
Hibernia Bank
George Brown
Southern Pacific Company
Gus Lachman
McCreery Estate
Housing Board
Bank of America

It follows that Mr. Morrish's valuation of the land at $700,000.00 is an overvaluation to the extent of $541,125.00 ($700,000.00 minus true value of $158,575.00).

Mr. Morrish made a further error of $54,014.44, in using the balance sheet of December 31, 1939, as his basis, which was a whole year earlier than our transaction in January, 1941. There was an operating loss of $54,014.44 in the year 1940, R. 610. In the ten years[11] 1931-1940 Merchants Ice had aggregate operating losses of over half a million dollars, R. 610, as follows:

| Year | Loss |
|---|---|
| 1931 | $ 47,517.09 |
| 1932 | 146,600.46 |
| 1933 | 90,413.95 |
| 1934 | 36,791.86 |
| 1935 | 38,575.89 |
| 1936 | 75,114.59 |
| 1937 | 8,424.03 |
| 1938 | 128,285.18 |
| 1939 | 17,762.76 |
| 1940 | 54,014.44 |

[11]This was the period of the Maffei-Arnold management, R. 293.

Mr. Morrish forgot to consider the last year, 1940, in "figuring" value of January, 1941.

Mr. Morrish included in his valuation, "Accounts Receivable, $92,144.40", as carried on the books. After Bercut took over the management in February, 1941, the following accounts receivable were found to be worthless, R. 606-607:

| Debtor | Amount |
|---|---|
| Frostcraft Corporation | $11,056.44 |
| W. A. Sherman | 9,595.15 |
| Pacific Empire Holdings | 35,949.29 |
| San Francisco Fruit Co. | 1,617.26 |
| | $58,218.14 |

Mr. Morrish also made an omission of a loss of $22,000.00 paid to Bank of America as a holder of negotiable warehouse receipts covering non-existing butter. The loss occurred before the sale to Bercut and had to be paid after he took over the management, R. 303, 495, 608.

The foregoing demonstrated errors in Mr. Morrish's valuation calculations aggregate as follows:

| | |
|---|---|
| Overvaluation of land | $541,125.00 |
| Operating loss during 1940 | 54,014.44 |
| Worthless receivables | 58,218.14 |
| Butter loss | 22,000.00 |
| Total | $675,357.58 |

Mr. Morrish used a "net value" of $716,233.01 which is accordingly erroneous to the extent of $675,357.58. Subtracting the latter figure from the former, the result is a corrected net value of only $40,875.43. Since there were 41,615 shares of preferred stock outstanding there was but $1.00 a share, approximately, allocated to the preferred

shares, with no intrinsic value in the common stock. We received 12,186 shares of preferred stock, or a value of $12,186 under the Morrish method of valuation. We paid $35,000.00, plus $3850.00[12] additional.

There is still further evidence which the brief for appellant suppresses or withholds. Merchants Ice bonds and stocks were unlisted, and trades were over-the-counter. We called as witnesses F. C. White, Pacific Coast Manager of National Quotation Bureau, R. 580-588, and L. J. Spuller, Jr. manager of trading department of Elsworthy & Company, dealers in unlisted securities on the San Francisco market, R. 589-592. We tabulate their twelve pages of testimony:

BONDS (par $100)

| | | | | | |
|---|---|---|---|---|---|
| Jan. | 26, 1940 | $65 | bid | 70 | asked |
| Feb. | 2 | | | 81 | sold |
| | 23 | | | 80½ | asked |
| July | 28 | 78 | bid | | |
| Aug. | 6 | | | 82 | asked |
| | 12 | | | 86 | asked |
| | 29 | 76 | bid | 79 | asked |
| | 30 | 79 | bid | | |
| Oct. | 23 | | | 71 | sold |
| | 30 | | | 75 | asked |
| Nov. | 28 | 70 | bid | | |
| Dec. | 21 | 60½ | bid | | |
| | 24 | 65 | bid | 70 | asked |
| | 26 | 65 | bid | 70 | asked |
| | 27 | 68½ | bid | | |
| | 28 | 65 | bid | 70 | asked |

[12]The Bercuts were to have received 65,863 shares of common and 12,495 shares of preferred. They actually received 62,341 common and 12,186 preferred, R. 603. In order to receive what they actually received, they had to pay out $3,950.00 to get a large block of preferred released from a pledge, R. 603-605. Pacific Empire Holdings repaid $100.00, "leaving the Bercuts still out $3,850 over and above the $35,000", R. 606.

## PREFERRED STOCK

| | Bid | Asked |
|---|---|---|
| Nov. 15, 1939 | $1.25 sold | |
| Dec. 1, 1939 | 1.00 | |
| Jan. 2, 1940 | 1.15 | |
| 6 | 1.25 | |
| Feb. 5 | 1.125 | |
| 6 | 1.25 | |
| Apr. 2 | 1.25 | |
| Nov. 1 | 1.00 | $2.00 |
| Dec. 2 | 1.50 | |
| 6 | 1.25 | |
| Jan. 4, 1941 | 1.50 | |
| 8 | 1.00 | |
| Feb. 10 | 1.50 | |
| Mar. 3 | 1.50 | 2.50 |
| Apr. 5 | 1.50 | |
| 7 | 1.50 | |
| Jan. 28, 1942 | 2.00 | |
| Mar. 21 | 2.00 | |
| Apr. 2 | 2.00 | |
| 4 | 2.00 | |
| 7 | 2.50 | |

## COMMON STOCK

| | Bid | Asked | Sale |
|---|---|---|---|
| Nov. 15, 1939 | | | .12½ |
| Mar. 14, 1940 | | | .15 |
| 16 | .10 | | |
| Nov. 1 | .10 | .10¾ | |
| Apr. 1, 1941 | .50[13] | | |
| 3 | .40 | | |
| Jan. 6, 1942 | .50 | | |

[13]This was three months after the Bercut transaction of January 8, 1941, and two months after Bercut took over the management on February 1, 1941.

| | | Bid | Asked | Sale |
|---|---|---|---|---|
| Feb. | 5 | .25 | | |
| Mar. | 2 | .50 | | |
| Apr. | 2 | .50 | | |
| | 7 | .50 | | |

*Cost.* Recurring to the statement at page 6 of the brief for appellant that the cost of the Merchants Ice stock to Pacific Empire Holding "was about $400,000", the references are to Maffei, R. 71,[14] and Arnold, R. 865,[15] where their direct testimony was most vague and general about it. The main acquisition was about ten years before the Bercut deal, at which time in the past Maffei and Arnold obtained the large holding that gave them control, at a price that Maffei stated on direct examination was "Well, about $250,000.00." In the first place, Merchants Ice suffered operating losses aggregating $540,000 in the ten-year period between the acquisition of the stock and the sale of it to Bercut. In the second place, Maffei's figure of $250,000 is reached through jugglery: on cross-examination about it, it developed that some stock promoters, Vincent and Stratton, R. 291, had ten years before somehow obtained control, and were joined by a lawyer and one Sherman, manager of Merchants Ice, R. 291, and the four got together and "sold" the big block of Merchants Ice stock to Pacific Empire Holdings, and turned management of Merchants Ice over to Maffei and Arnold, R. 291-292. Only $10,000 in cash was used to make that deal, R. 311. The acquisition from Vincent-Stratton was

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[14] "Well right around 1930 or 1931 they had a few shares, but the big interest was when they took over the McInerney stock and the Sherman stock, and Vincent and Stratton", at a price of "well, about $250,000".

[15] "I think if we added everything up, it probably would cost" half a million.

not for cash, but was on a paper basis under which "an open account in the books" against them was wiped out in an amount "about $85,000, between $80,000 and $90,000", R. 309. Maffei testified, R. 308-309:

"Q. [by Mr. Naus] Now, as a matter of fact, you did not really pay them $250,000 for it, did you, or do you know what you paid them?

A. Well, the way to find out is from the books.

Q. You did not refer to the books when you gave the figure of $250,000. I am going to get where you took that figure from. Where did you get that figure of $250,000 in your mind; how did you make it up?

A. I know more or less how much the big blocks cost.

Q. What are you referring to as the big blocks?

A. The Vincent-Stratton block was around $90,000, and the McInerney stock was around $80,000—$75,000 or $80,000, something like that.

Q. All right, take the Vincent-Stratton block. You say that block cost about what?

A. About $85,000, between $80,000 and $90,000.

Q. Between $80,000 and $90,000?

A. Yes.

Q. Do you recall that you immediately recorded in the books of the Pacific Empire Holdings that as an asset in the amount of $250,000, that one block?

A. Well, that was according to the statement of the Merchants Ice & Cold Storage Company, I suppose, not the cost.

Q. I don't know how you arrived at the figure; I am asking you about the fact. You recall that this block of stock that you say you bought from Vincent and Stratton for around $80,000, that you recorded this in the books of the Pacific Empire Holdings as an asset of the value of $250,000; do you recall that?

A. Well, I suppose that was put on the books as the value of the stock."

The ultimate carrying of the "investment" in Merchants Ice stock on the books of Pacific Empire Holdings at around $700,000 grew out of "write-ups". Maffei testified, R. 308:

"Q. [by Mr. Naus] It was a write-up, was it not?
A. It would be."

One of the witnesses called by plaintiff was Walter O. H. Plagemann, who had been in the employ of Merchants Ice for twenty-five years, R. 510. He testified, R. 513:

"Q. [by Mr. Scampini] As a matter of fact, Mr. Plagemann, under the regime of Stratton and Vincent and Mr. Sherman and Mr. Arnold there was some very poor management, was there not, in your opinion?
A. Yes.
Q. There were a lot of shenanigans in the company, were there not?
A. They thought money was growing on trees."

At the end of 1940 Pacific Empire Holdings was indebted to Merchants Ice for an aggregate of $46,999.29 cash withdrawn from the latter from time to time, R. 519. Plagemann testified:

"Q. [by Mr. Scampini] Was it ever actually paid off, this balance, or was it just shifted around?
A. It was shifted around from place to place. This was never paid up. It is still owing." [R. 519.]

"Q. [by Mr. Scampini] Whenever those individuals wanted any money they would go down to the

Merchants Ice & Cold Storage Company and help themselves and shift the books around and charge it to this, that or the other?

A. Yes.

Q. That is the way they ran the Merchants Ice & Cold Storage Company?

A. Yes.'' [R. 520.]

At the time of the Bercut transaction, Merchants was insolvent. Its aggregate deficit for the ten years ending December 31, 1940, totaled $543,501.25, R. 610. Its real estate taxes were in default and unpaid, R. 608; it had no funds with which to pay wages and neither it nor its affiliate corporations had cash or credit to be used for any purpose, R. 494-495, 606-608. The bill of the Pacific Gas & Electric Company was unpaid, and as a result of default and failure of the company to deliver on warehouse receipts for butter, the Bank of America was claiming $38,000, R. 608. The publicity attendant on this claim had caused a complete loss of public confidence in the Merchants, with the result that the few remaining customers were afraid to put their merchandise in storage with Merchants, R. 627. Mr. Richards, one of the directors, had endeavored to interest other persons in the concern but to no avail.

Without drastic action by which additional managerial supervision and very substantial financial aid could be obtained, the Merchants would have had to close its doors, resulting in complete loss to the shareholders and partial loss to creditors. This condition was proved by the testimony of all of the witnesses produced by plaintiff.

The shares had a potential value to Bercut by reason of the fact that he was willing to pledge his individual credit and to labor for two years with no compensation in order to rehabilitate the concern. Based upon his own financial standing and endeavors the shares had a prospective value even though they had no present value. As testified to by Mr. Bercut, as a result of his purchase the option to purchase 20,000 shares retained by Pacific Empire Holdings had greater value than all of the shares sold to Bercut at the time of the sale.

**(e) Peter Bercut was not a director of Pacific Empire Holdings, Inc., at the time of the deal. Finding III that he was a director until the first day of May, 1940, and finding VII that he was not a director subsequent to May, 1940, are supported by the evidence.**

The findings are supported by the evidence when the whole is viewed and weighed.

At pages 41 to 50 of his brief appellant sets forth some of the evidence. The evidence is in conflict. Because of the conflict, appellant at his page 49 makes the partisan assertion that the testimony of Bercut was false. The trial judge, however, resolved whatever falsity may be implied from the conflict by finding it to be the other way around, i.e., that the testimony of Bercut was true. Some of his testimony is quoted by appellant at his pages 42 and 43.

Two things are confused by the appellant: (1) The actual resignation orally made about May 1, 1940; (2) the insistence of Bercut during the negotiations with him that there be a record of the fact of former resignation,

resulting in the writing being dictated by Arnold[16] to the latter's secretary. The time of writing is unimportant; the time of actual resignation is the important thing. Appellant's quotation at his pages 42 and 43 leaves the two occasions confused. Other testimony supports the finding. Bercut testified, R. 320-321:

"A. [to Mr. Scampini] I never knew the difference between the two corporations, because they were so mixed. I meant both.

Q. You meant both of them?

A. Yes, sir.

Q. Now, to whom else did you say that you did not want to have any more to do with these companies on or about April, 1940?

A. My accountant told me to resign.

Q. Your accountant told you to resign; is that right?

A. Yes.

Q. I did not ask you that. I asked you to whom else besides Mr. Arnold in these companies, that is, the Pacific Empire Holdings and the Pacific Empire Corporation, you made known your intention not to continue as an officer or director.

A. I told Arnold.

Q. You just told Arnold and nobody else?

---

[16]The stenographer, Leona Keener, is quoted by appellant at his pages 44 to 47. That the document was dictated to her, that she typed it, that it was dictated at some date probably in January, and that the paper was backdated, is unquestioned. All that she says may be assumed to be true, excepting the fact as to *who* dictated it, which is comparatively unimportant, but as to which the trial judge impliedly found that Arnold, not Bercut, dictated it to Arnold's secretary. Bercut testified, R. 322:

"A. [to Mr. Scampini] That is my signature. I asked Mr. Arnold that I wanted to have it in writing, and he went into the office and he dictated that resignation himself. I never dictated anything to any of Arnold's stenographers."

A. That is all.

Q. You did not tell anybody else, did you?

A. No.

Q. You never sent in a resignation to either one of the companies later on, did you?

A. Later on I asked for my resignation in writing.

Q. You asked for your resignation first?

A. Yes, and I asked later to give it to me in writing.

Q. Let us get to the bottom of this thing. Did you ever file a written resignation as an officer or director of the Pacific Empire Corporation?

A. Yes.

Q. When did you?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold you would like to submit your resignation in writing?

A. No; I wanted to resign, but I wanted everything in writing.

Q. You wanted to file it in writing?

A. I wanted to go on record.

Q. When did you tell that to Mr. Arnold?

A. Just when we were dealing for the purchase of the Merchants Ice & Cold Storage Company."

He amplified, R. 323-324:

"Q. [by Mr. Scampini] Well, now, when did the negotiations for the deal begin, Mr. Bercut?

A. Along about sometime in December, 1940.

Q. And was the occasion upon which you signed this letter of resignation after the commencement of the negotiations with Mr. Arnold?

A. Yes.

Q. But you say it was before they were actually completed, is that right?

A. When I saw that there was a possibility of making the deal, I wanted to make sure I was not a director, because I had resigned to Mr. Arnold orally, and I wanted to be sure it was in writing."

Turning to the event or occasion of the fact of resignation nearly a year before, he testified, R. 324-325:

"Q. [by Mr. Scampini] You say you resigned on or about March 30, 1940, by telling Mr. Arnold that you were not going to be a director?

A. That is right.

Mr. Naus. He said about April.

Mr. Scampini. Q. About April?

A. About April.

Q. Why did you make that statement to Mr. Arnold?

A. We had difficulty between us two.

Q. What was the difficulty?

A. Well, they were rather personal. I loaned him $2000.

Q. Give us all the facts.

A. He kept it some time and I asked him later on about it, and he finally gave me half of it back, and then I pressed him some more, and he gave me the other half, and he gave me his postponed check; and things did not look good to me any more, and I said I had better resign from these companies, they didn't look good to me.

Q. What companies are you referring to?

A. I was referring to the two companies. That is why I pressed him at that time."

The date of the precipitating matter of Arnold's postdated check was later fixed by documents. After relating the circumstances surrounding the making of the $2000 loan,

R. 378-379, Bercut's personal check for $2000 was received (printed at R. 380) for the limited purpose of fixing the date, which was January 15, 1940, R. 379-380. A monthly statement of a personal account of Bercut's in a bank (printed at R. 382) shows a deposit of $1000 on January 31, 1940, which was identified as Arnold's "first [$1000] payment on the $2000", R. 381. A carbon of a bank deposit slip (printed at R. 384) shows a deposit of $1000 by Bercut in a personal bank account of his on May 6, 1940, which was identified as the final repayment by Arnold, R. 383, 384. That was a check that had been postdated about two weeks to May 6, 1940, and fixes the date, and the precipitating cause, of the resignation as about two weeks before May 6, 1940; Bercut testified, R. 384-386:

> "Q. [by Mr. Naus] So, was it on May 6, 1940, that you deposited Mr. Arnold's check for the second $1000 that he paid back to you?
>
> A. Yes.
>
> Q. I understood you to say to Mr. Scampini this morning that on the second $1000 Mr. Arnold gave you what you called a postponed check; you mean a postdated check?
>
> A. Yes, postdated.
>
> Q. Now, this postponed or postdated check that you deposited on May 6, 1940, you deposited it as soon as the date came that was written on the check, didn't you?
>
> A. Yes, I was expected to hold it until that date.
>
> Q. About how long in the future was the check dated or postdated when Mr. Arnold gave it to you?
>
> A. Oh, I think about two weeks.
>
> Q. It was postdated about two weeks?
>
> A. Yes.

Q. Well, then, is it not the fact that he actually handed you this check approximately two weeks before May 6, 1940, the date you deposited it?

A. Yes.

Q. Do you fix the time of your statement or oral resignation to Mr. Arnold as the time when he finally gave you the postdated check?

A. Yes, because I had quite some trouble getting it from him.

Q. Tell the Court something about the difficulty you had in getting that second check from Mr. Arnold, after he had given you the first check.

A. I had to go several times, and most of the time they would tell me Arnold was not there, and finally I saw him, I caught him there, and he had to give me the check.

Q. He gave you the postdated check?

A. He told me it had to be postdated.

Q. That would be roughly two weeks before May 6, 1940, when he finally gave you a postdated check that you told him that you were through with these two companies?

A. Yes.

Q. Now, in one of the exhibits put in by Mr. Scampini for the plaintiff there is a reference to the resignation being backdated to March 31, 1940. In putting that back date on your resignation was that date selected by you or was it selected by Mr. Arnold?

A. It was selected by Arnold. I did not even know what date it was when he gave it to me.

Q. Have you any idea why Mr. Arnold selected the date of March 31, 1940, any more than he might have selected any other date?

A. The only thing I can think of, he had to get close to the date that I resigned."

**(f) The negotiations were opened by Arnold and Maffei.**

The reason for selling Merchants Ice stock were stated by Maffei, R. 290:

> "Q. [by Mr. Naus] Now, tell me, Mr. Maffei, why did you and Mr. Arnold sell this block of Merchants Ice & Cold Storage company to Mr. Bercut?
>
> A. On account of financial conditions.
>
> Q. Well, can you keep in mind that this whole lawsuit is about that sale?
>
> A. I understand.
>
> Q. And that you are one of the defendants, here, and you have an attorney sitting over at the table where I am?
>
> A. That is all right.
>
> Q. All right, can you tell his Honor any more about why you sold that stock to Bercut than you have just said?
>
> A. That is all we sold it for, on account of financial conditions, and finding ourselves pressed for finances; there was nothing else to do."

In other words, the idea of selling originated with Maffei and Arnold. At first, they tried through director Webb Richards to work out a refinancing. Richards testified, R. 634-636:

> "Q. [by Mr. Brownstone] Now, where was your office subsequent to February 15, 1938?
>
> A. Well, that is a difficult question to answer for the reason that I had been engaged in reorganization work of several companies and I maintained an office from 1938, I was doing work for the Pacific Empire, and I believe had started on the Frostcraft Corporation, and also was doing some work for the truck line and had offices at 242 Second Street.

Q. In connection with the reorganization of the truck line, that reorganization was completed?

A. That was completed.

Q. On or about November, 1940, is it or is it not a fact that you at least occupied a portion of your time at the office of the Pacific Empire Holdings?

A. That is correct.

Q. Is it or is not a fact that on or about November, 1940, Mr. Arnold requested you to interest any person whom you could interest in the purchase of the stock of Merchants Ice & Cold Storage Company then owned by Pacific Empire Holdings?

A. Mr. Arnold and I discussed for some time, the date would come within the time you mentioned, various methods of trying to relieve both the holding company and Merchants Ice & Cold Storage Company of their difficulties, and I made several efforts to get the company financed along various lines, I approached investment houses and also certain parties, too.

Q. Did you approach the firm of Stephenson Leydecker in Oakland?

A. Yes, naturally.

Q. Did you speak to R. D. Gross of the R. D. Gross Company here?

A. I did.

Q. And your net result of all your attempts was you were unsuccessful in interesting them in the purchase or refinancing of the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. You knew that on or about this time Mr. Arnold was also negotiating with Mr. Bercut for the sale or refinancing of this Merchants Ice & Cold Storage Company shares of stock?

A. That is right.

Q. Now, Mr. Richards, can you estimate for us the period of time toward the end of the year 1940 during which you were endeavoring to interest other persons or firms in this block of Merchants Ice & Cold Storage Company stock? * * *

A. Let me make my position clear, as far back as the time we were successful in extending these bonds, we were trying to get the company on a financial basis, and the market was so weak that in normal procedure we could see it would be almost impossible, and whenever any of us thought of an idea we would try to work on it; I cannot remember any specific time like say November, 1940. I know that during that period we were attempting to cure their financial trouble.

Q. During the period of negotiations with Mr. Bercut, you, yourself, were endeavoring to interest other persons in the purchase of this stock?

A. That is right."

Arnold testified, R. 728:

"Q. [by Mr. Scampini] And what do you mean by 'we', when you said 'we negotiated its sale'?

A. I mean that we—that Maffei and myself on behalf of the holding company were endeavoring to work out a plan where—well, that would help and more or less save both companies, you might say.

Q. Well, now, what did you do pursuant to that intention?

A. Well, we opened the subject up for discussion with one or two places.

Q. Where did you open it up?

A. We discussed it at length with Mr. Gaither over at the Pacific National, and of course discussed it with Mr. Bercut; in other words, the financial——

Q. When did you first start to discuss it with Mr. Bercut?

A. It must have covered a period of thirty or sixty days, I guess.

Q. Who conducted the negotiations with Mr. Bercut?

A. Most of them were conducted by myself."

He further testified, R. 729:

"Q. [by Mr. Scampini] Well, what was the financial condition of the holding company which made it necessary that you have this transaction?

A. Well, our loans had been criticized over at the Pacific National.

Q. What loans?

A. The loans of the holding company.

Q. Yes.

A. We had a big government suit against us on the revenue stamp tax, and there were other obligations pressing.

Q. And was the financial condition of the Merchants involved, too, at that time?

A. Yes, the financial condition of the Merchants was very much involved at that time.

Q. Well, now, what did you say to Mr. Peter Bercut when you first opened the subject to him?

A. Well, I don't know as I can give my exact words.

Q. Well, give the best recollection that you have.

A. Well, we approached Mr. Bercut, or I did—either Mr. Maffei or myself. I believe I did.

Q. What did you approach him for?

A. For the purpose of—well, at that time we were endeavoring to work out some sort of an association with someone who had certainly more credit than we had.

Q. What do you mean—'we had'?

A. The Pacific Empire Holdings and the Merchants Ice & Cold Storage Company, both of them. We were at about the end of our situation so far as credit was concerned and so far as obtaining sufficient cash to meet our commitments, and we were endeavoring to associate ourselves with some partnership arrangement.

Q. With whom?

A. In this instance with Mr. Bercut."

Arnold's testimony makes it clear that the transaction with Bercut was initiated by Arnold and Maffei. Arnold testified, R. 771:

"Q. [by Mr. Goodman] This transaction with Mr. Bercut was initiated by yourself, was it not?

A. Yes.

Q. And because of the necessities of both companies—that is, the Merchants and the holding company—you were seeking to get financial help and additional leadership? That is correct, is it?

A. That is right.

Q. And when you first took up the transaction with Mr. Bercut, it is a fact, is it not, that he was reluctant to go into the deal?

A. At first he merely expressed interest—that is all.

Q. And isn't it a fact that he also told you at the time that he had many other business interests and was not anxious to increase his responsibility?

A. I believe he mentioned that at one time, yes.

Q. Did Mr. Bercut at any time bring any pressure to bear upon you or urge you to make the transaction?

A. I couldn't term it 'pressure', no.

Q. Well, did he ever urge you to make the transaction?

A. Not in that sense of the word, no."

Arnold made a proposal to Bercut that the latter buy "a majority" of the Merchants Ice block of stock at $50,000, R. 733-734. Arnold testified, R. 734:

"Q. [by Mr. Scampini] What did he say to you after you proposed it to him?

A. Well, he expressed interest. He was somewhat skeptical because of our condition first, but he——

Q. Whose condition?

A. Merchants.

Q. Well, then, what did he say to you?

A. Well, I don't exactly know, but he said he wanted to look into it.

Q. All right. Did he look into it?

A. Yes, he did.

Q. Then what happened next?

A. Well, there was a lapse in our negotiations, probably twenty or thirty days.

Q. Then what happened?

A. During which time our condition did not improve.

Q. Then what happened?

A. Then we resumed our negotiations again.

Q. All right.

A. And——

Q. What did you say to him and what did he say to you?

A. Well, he expressed the fact—while we were negotiating, why, he naturally had found out about certain losses that were there, and we also had another loss that was somewhat publicized in the papers,

or a threatened loss, and he became somewhat hesitant upon working out the deal.

Q. What did he say to you?

A. However—well, on one occasion I have to admit he said that he didn't know whether he wanted to go through with it or not.

Q. All right. Then what happened?

A. There was another little lapse, and then we resumed again, and we were able to come to an understanding."

Bercut testified, R. 338-341:

"Q. [by Mr. Scampini] When was it that Mr. Arnold or Mr. Maffei first approached you on this deal which took place on January 8, 1941?

A. Sometime in December [1940].

Q. Who approached you?

A. Arnold.

Q. What did he say?

A. Well, it started this way: That we had a stormy meeting at the Merchants Ice & Cold Storage Company. One of the directors [Mr. Schinneller] made the statement that he was not satisfied with the management of the company, and there was only one man [Bercut] on this whole board that they thought could run this plant. * * * He [Arnold] said at that time, he told me, 'You know, Mr. Schinneller made the remark at the last meeting' that I should be manager of the company, or something of that kind; so I said, 'I am very sorry he said that, because it is nothing for me; I am not looking for a job, I am not looking for anything; I am satisfied to be one of the directors'. Then he said, 'We want to sell our stock, the majority stock or controlling stock', and I said, 'Well, I don't know if I am interested or not'. Well, he told me that he himself never made a suc-

cess of it for fifteen years, and they could not make a success, and maybe I could. And I said, 'What is your figure? What do you expect for it?'. And he said, '$50,000'. And then negotiations stopped there, and I said, 'I will let you know'. Then he called me again, and I went there, and he said, 'Will you make an offer?'. And I made an offer of $35,000, and I went away again. And he called me again, and then I came up and the third time that I came there was news that there was fraud in the butter or something of that kind; it was already in the [papers], you know, and I heard about it, and I said 'This looks like a bad mix-up; I am going to stay out of it'. And then he said he tried to settle the case himself so as to get me interested again, so he went down to the Bank of America and he offered to settle for $38,000 if they gave him a long time to pay, a couple of thousand a month, in order to satisfy me. But anyway, I was not interested any more, so I went away for a whole month; I went to Los Angeles, and I stayed there a whole month, and then I came back and made inquiry about how much the loss would be, and he [said] it would be between $30,000 and $40,000, and I finally made an offer, and he took me down to the bank and gave me the stock and made the bill of sale and everything, and I thought that was all right, so I said, 'Now you have all these matters settled between yourself and Mr. Maffei, and I want to see Mr. Maffei and tell him', and he said he had a perfect right, and they were willing and they would go all through the negotiations that would be necessary.

Q. Did you see Mr. Maffei?

A. Yes.

Q. When Mr. Arnold first approached you he asked you for $50,000?

A. Yes.

Q. For all the stock or half of the stock?

A. No, he told me all of the stock.

Q. 50,000 for all of the stock?

A. Yes.

Q. You are sure?

A. Yes.

Q. Did he offer to sell you half of the stock for $50,000?

A. No.

Q. Why weren't you willing to accept the suggestion that you become president of the Merchants Ice & Cold Storage Company?

A. My experience in business tells me unless you have control you can't handle it without too much interference from people that have no experience, you cannot have success.

Q. When it was suggested that you become president, you would not be interested unless you had control of the Merchants Ice & Cold Storage Company; is that right?

A. Yes.

Q. When Mr. Arnold approached you to buy this control, you say he offered to sell to you for $50,000 and you made him an offer?

A. Yes.

Q. How much did you offer?

A. $35,000. I never changed."

Bercut took over the management of Merchants Ice on February 1, 1940, R. 386, and immediately fired Arnold, Maffei and Morrish out of the management of Merchants Ice, R. 392, and commenced physical rehabilitation of the run-down plant, R. 386, 611-613. He appointed a new manager, W. G. Evans, R. 593-594. There was but $2000 cash on hand, R. 611, with $162,710.71

credit or cash provision needed through 1941, R. 611, 612. More gross business or sales was badly needed, R. 487 (Morrish), which Bercut went out into the trade to bring in, R. 615.

**(g) Miscellaneous corrections.**

The principal additions to, and corrections of, appellant's statement are contained in the foregoing affirmative statement of the record by us. There are a few miscellaneous matters to which we will refer under the page numbering of appellant's brief:

*Page 8:* He says that Merchants Ice never defaulted in the payment of any of its obligations or in meeting its bond maturities. The point is that a 5-year moratorium had been obtained through the 77B proceeding and the deal with Bercut was made near the end of that 5-year period, i.e., somebody would have to put up $20,000 in cash by March 1, 1941, with the indenture trustee, a month ahead of the due date of April 1, 1941.

*Page 13:* There is an innuendo that Arnold helped himself to the funds of Merchants Ice for his personal use. Nothing in the record supports the innuendo. The record abundantly discloses the movement of funds back and forth between the corporations but the movement was all recorded in the account books of the corporations.

*Page 29:* He asserts that the pledge of the block of Merchants Ice shares by Pacific Empire Holdings, Inc. to Pacific Empire Corporation "had never been satisfied or released". To the contrary, Plaintiff's Exhibit 9

printed at R. 114, et seq., is a contractual arrangement under which Pacific Empire Holdings, Inc. was one of three parties thereto, and under which the block of shares was pledged to the third party thereunder (Joseph McInerney) and contractual representation was made therein that the shares were then "free and clear", R. 116, and that contract is signed, R. 121, on behalf of Pacific Empire Holdings, Inc. by Maffei as president and Arnold as secretary, and on one of the originals of the contract in the hands of Pacific Empire Holdings, Inc. appears the following notation, R. 121:

"Original also has
signature of
P. Empire Corporation
L.R.A."

The initials L.R.A. being the initials of Arnold. It is therefore evident from the record that by the date of that contract, April 24, 1936, the previous pledge to Pacific Empire Corporation had been released, or else by the signature of Pacific Empire Corporation thereto the contractual arrangement itself operated to release the previous pledge.

*Page 38:* He would have it appear that Bercut refused an offer of a million dollars for the block of Merchants Ice shares. In the first place, no such offer was ever made to him and has not been made to him in an acceptable form up to the present moment. All that happened was that Mr. Scampini, as a cross-examiner, tossed a million dollars around in a conversational way and what he now omits at his page 38 is the following comment by the trial Court and by Mr. Bercut, R. 344:

"The Court. It is speculative.

A. [by Mr. Bercut] They are not offering me that money."

*Page 38:* He states that no directors, other than Maffei and Arnold, were consulted respecting the Bercut sale. The record shows that director Heer (an office employe of Pacific Empire Holdings, Inc.), knew about it; that director Ryerson was shortly afterwards informed of it; and that director Richards was actively making an effort to refinance the companies and knew about the transaction with Bercut when it was made. In short, the record shows that every one of the directors knew about it excepting director Giachini who lives away from San Francisco and did not testify. The record simply does not disclose clearly one way or the other whether he had knowledge or not.

*Pages 38-39:* He states that director Webb Richards did not know the "true" details of the transaction until about August 20, 1942. The record does not support that statement. The appellant's references are to R. 638, where director Richards testified that it was not until that time that he knew the "complete" details, but the same page of the record contains his answer that he knew that the deal had been made when it was made.

*Page 50:* He states that as the result of the transaction the Holding Company found itself without assets. After the transaction, the Holding Company was still the owner of a 47½% interest in California Pacific Service, Inc. and was still the owner of 52% of the outstanding stock of Pacific Empire Corporation. Although appellant further states at his page 50 that these shares were

previously pledged to Kohler & Chase, the fact is that they were not pledged to Kohler & Chase until on or about April or May, 1941, some three or four months subsequent to the transaction with Bercut, R. 257.

*Page 53:* He states that on September 9, 1942, the receiver "repudiated and rescinded" the transaction of January 8, 1941. His reference to the record does not support the statement. Plaintiff's Exhibit 34, R. 393-395, is not a notice of rescission. It is a letter that uses only the word "repudiate" and was written and signed by Mr. Scampini as attorney for the receiver. "Repudiation" by a receiver is an altogether different thing than a rescission. Repudiation by a receiver relates only to those portions of a contract which are still executory and simply operates to give notice that the receiver will not perform the executory remainder of a contract. At R. 603 will be found the details as to the number of shares of Merchants Ice that the Bercuts are still short in delivery from their promissor, i.e., they are still short 3522 shares of common and 208.33 shares of preferred. The repudiation by the receiver therefore put them on notice that as to that executory portion of the contract it was up to the Bercuts to present a claim for damages in the receivership.

*Page 73:* It is suggested that there is no dispute about the testimony of Morrish that "the prospects and future of Merchants Ice were increasingly bright". Those words are not the words used by Morrish in his testimony and his testimony has to be overstrained to use them at all; but in any event the record at large does not justify

the statement that the testimony of Mr. Morrish is "undisputed".

*Page 78:* After stating on page 77 that the by-laws with respect to the authority of the executive committee may be found printed in Part I of his appendix (wherein it appears that the executive committee is given authority to exercise all the powers of the board of directors "but subject to the immediate disaffirmance by the board at its next meeting") he states that the next meeting of the board was held on August 20, 1942, that the Bercut deal was discussed thereat, and that thereat at its first opportunity upon learning of the deal the board repudiated the transaction. The statement is not warranted by the record as the board did not repudiate the transaction at all. The board simply consented to the appointment of a receiver. The record at bar shows abundant justification for the appointment of a receiver without regard to repudiation of the Bercut deal.

*Page 93:* He repeats the same misstatement that at that meeting the board "emphatically disaffirmed the deal". The record does not support the statement.

*Page 116:* He states that it cannot be denied that the insolvency of Pacific Empire Holdings, Inc. resulted directly from the Bercut deal. It is denied, not only by us but by the trial Court, because in finding IX, at R. 951, the Court found that it was not the sale of the Merchants Ice shares to Bercut that rendered Pacific Empire Holdings, Inc. insolvent and that the financial condition of the corporation was due to causes other than the sale of said shares.

## II.

### ARGUMENT.

**"Points Nos. 1 and 3."**

The case comes to this Court with a finding, in substance, that Bercut ceased to be a director on May 1, 1940. That is more than eight months before the transaction of January 8, 1941. It is six months before the beginning of the negotiations that resulted in the transaction. In our statement, supra, under I(e), we have spread credible evidence clearly supporting the finding, i.e., showing an oral resignation about two weeks before an identified event that occurred on May 6, 1940. The whole of the argument for appellant at his pages 61 to 65 is one that depends upon a solution of testimonial conflicts and credibility.

Appellant, at his page 63, asserts that under the by-laws a resignation of a director must be first "duly accepted" and in support of that assertion he refers to "Part I of Appendix" to his brief. His reference is incomplete because Part I of his Appendix is incomplete. Turning to the record the portion of the by-laws relating to directors is found under Article IV at R. 74p. On the next page, R. 74q, will be found "Section 4, Vacancies", and "Section 5, Resignation". Appellant quotes merely a portion of Section 4, having to do with the matter of a vacancy being deemed to exist in the board of directors on the occasion of a "resignation duly accepted"; but when we turn to the next section, "Section 5, Resignation", we find that under that section, which deals directly with the matter of resignation of a director, *acceptance* of the resignation is required when the "res-

ignation would reduce the number of directors to a number less than necessary to form a quorum of said board". In other words, the by-laws do not require or call for acceptance of a resignation whenever the number of remaining directors would amount to a quorum or more. At bar, the board of directors consisted of seven and a quorum consisted of four. Bercut's resignation left six directors on the board, or two more than a quorum. The by-laws therefore did not, and do not, condition the effectiveness of his resignation upon an acceptance.

An oral resignation is sufficient: *Clark v. Oceano Beach Resort Co.,* 106 Cal. App. 574, 576, 289 Pac. 946, 947; 14a C. J. 73, § 1836; 19 C. J. S. 69, § 736(b); *Briggs v. Spaulding,* 141 U. S. 132, at 154,[17] 35 L. Ed, 662, 671. The California case just cited, and C. J. and C.J.S., add that "an acceptance is not necessary to render the resignation effective, unless it is tendered to take effect on acceptance", which the one at bar was not. Upon the single question decided in *Security Investors' Realty Co.*

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[17]At this page the Supreme Court said: "The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure, but if the fact exists, and is adequately proven, the result is necessarily the same as applied to this case. We do not understand that because § 5145, Rev. Stat., provides that directors shall hold office for one year, and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the Banking Law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective. Rex v. Rippon, 1 Ld. Raym. 563; Olmsted v. Dennis, 77 N.Y. 378; Chandler v. Hoag, 2 Hun. 613, 63 N.Y. 624; Bruce v. Platt, 80 N.Y. 379; Port Jervis v. First Nat. Bank, 96 N.Y. 550."

*v. Superior Court,* 101 Cal. App. 450, 281 Pac. 709, it was said:

> "The whole question to be determined in this matter is whether or not the said Meserve was, at the time of the service of the said summons and complaint, secretary of or a director of said corporation.
>
> Some point is made of the fact that in the by-laws of said corporation it is provided that 'each director shall serve for the term for which he shall have been elected and until his successor shall have been duly elected and have qualified * * *', and also 'the executive officers of the company shall be a president, vice-president, secretary and treasurer. The president, vice-president, secretary and treasurer shall be elected annually by the board, and shall hold office until their successors are appointed'.
>
> Quoting from 7 Ruling Case Law, p. 427, § 416: 'Resignation: An officer of a corporation may terminate his office by resignation, if the statutes, charter and by-laws impose no limitation thereon, and, in doing so, he need give no notice to the public nor to persons dealing with the corporation'.—citing Zeltner v. Henry Zeltner Brewing Co., 174 N.Y. 247, 66 N.E. 810, 812, 95 Am. St. Rep. 574, and note therein. 'The fact that a statute requires directors, unless removed, to continue in office until their successors are appointed, does not prevent a director from resigning at any time' citing Briggs v. Spaulding, 141 U.S. 132, 35 L. Ed. 662 [671]. 'Since an officer may resign, as a rule, at pleasure, no action on the part of the corporation is essential to make his resignation effectual. Acceptance thereof by the directors or governing body is not required. When he tenders his resignation to the proper corporate authorities, to take effect immediately, the resignation is complete, although it

is not acted on by the corporation or entered in its books. * * *'

It was said in the cited case of Zeltner v. Henry Zeltner Brewing Co., supra: 'When we come to consider the general right of officers and directors of corporations to resign, we are at once reminded of the limitations of the question certified to us. We may admit, for the purposes of this discussion, that, as a general rule, such officers may resign at will, and that the validity of such resignations does not depend upon their formal acceptance.' Quoting from Briggs v. Spaulding, supra: 'The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure; but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because section 5145, Rev. St. [12 USCA § 71] provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective'.''

Examination of the Delaware cases[18] cited at appellant's pages 63 and 64 will disclose that they do not decide or

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[18]*Bowen v. Imperial Theatres, Inc.*, 13 Del. Ch. 120, 115 Atl. 918, merely relates to the probative effect of recitals in minutes. It is sufficient to say that Peter Bercut never signed any purported minutes of either of the Pacific Empire corporations of

discuss the foregoing propositions; indeed, do not touch them. His California citations[19] are even more barren.

Clearly, the valid finding of fact, and the law, are against appellant, in consequence of which it results that the transaction of January 8, 1941, was one between the corporation and a stranger, at arm's length. That being so, it would be proper for this Court to affirm the judgment without passing on the remainder of the argument, because it is merely in the alternative as it assumes *arguendo* that Bercut was a director at the time of the transaction. Simply to meet the brief of appellant fully, we now turn to the remainder of his argument.

**"Point No. 2."**

This presents a pure question of fact, i.e., sufficiency of the evidence to support the finding, VII, at R. 948, that the block of Merchants Ice shares was not worth more than $35,000, and that the price of $35,000 paid by Bercut for them was a fair, reasonable and proper price. The

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purported meetings held subsequent to his oral resignation of May 1, 1940. *Lippman v. Kehoe Stenograph Co.*, 11 Del. Ch. 190, 98 Atl. 943, does not hold what appellant states at his page 64 that it holds; it merely states, 98 Atl. at 948, col. 1, that the director *withdrew* his resignation at a meeting after tender and before action thereon, and from the long statement of facts in that case it may be gleaned that he remained present and acted as a director throughout the same meeting. *Re Chelsea Exchange Corp.*, 18 Del. Ch. 287, 159 Atl. 432, merely recites, at 159 Atl. at 435, col. 2, in substance that the resignation was accepted upon tender, and therefore does not touch the question of effect, if any, of non-acceptance.

[19]6a *Cal. Jur.* [1065] § 591, *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485 [8 Pac. 22], and *Reed & Co. v. Harshall*, 12 Cal. App. 697 [108 Pac. 719]. They relate merely to questions of evidence unrelated to resignations.

sufficiency of the evidence is shown under our statement, supra, part (d).

It is only by an assumption that the finding is untrue, i.e., by assuming that the block of shares was worth $250,000, that appellant leads into the remainder of his argument. The falsity in his premise of value destroys the argument, and for that reason the judgment should be affirmed.

**"Point No. 4."**

It is to be noted that appellant cites no authority hereunder. He states, at his page 68, that he postpones his argument against the authority of Maffei and Arnold to his Point 8(a), and so will we. He next states, his page 69, that Finding VII that the transaction was fair and equitable and that it was entered into in good faith after lengthy negotiations at arm's length, is an "unbelievable" finding, but his premise for the assertion is that *he* chooses to ignore the substantial portions of the evidence that support the finding. That is all there is to his argument. However, the trial judge resolved the evidentiary issues, the conflicts in evidence, and credibility, by accepting those substantial portions of the evidence that appellant has a partisan preference to ignore.

**"Point No. 5."**

The false assumption by appellant under this point is that it was the sale to Bercut that rendered Pacific Empire Holdings, Inc., insolvent. Its solvency or insolvency was unaffected by the transaction. The consideration of $35,000 has been found to be fair. The flaw in the argument of appellant appears at his page 71 where he

assumes that the price of $35,000 was but "a nominal consideration". Remove that false premise and the argument falls. If we assume insolvency at the time of the transaction on January 8, 1941, the transfer for a valuable consideration was nevertheless a valid transfer, *Security Trust Co. v. Silverman,* 210 Cal. 578, 292 Pac. 636.

**"Point No. 6."**

(a) At his page 72, appellant first complains of the finding, X, R. 951, that on January 8, 1941, Merchants Ice & Cold Storage Company was insolvent, that it had no funds with which to meet its payments and that it was about to collapse financially. The finding is probably unimportant one way or the other because, as to Merchants Ice, the question is whether the block of shares in it was worth more than $35,000. In any event, the evidence supports the finding. As shown in our statement, supra, Merchants Ice had operating losses every year during the ten years ending December, 1940, in an aggregate exceeding $500,000. It had but $2000 cash on hand, R. 611, with $162,710.71 credit or cash provision needed through 1941, R. 611, 612. Its current liabilities always exceeded current assets, R. 483-484. Its balance sheet as at December 31, 1940, R. 490-491, shows current liabilities of $187,540.01 as against current assets of $124,242.86, of which an aggregate of $58,218.14 turned out to be worthless, R. 606-607. We quote from the cross-examination of appellant's "star" witness Morrish, R. 494-495:

> "Q. [by Mr. Naus] Can you or not tell me whether as of December 31, 1940, the Merchants Ice

& Cold Storage Company was getting in fairly desperate need for cash to continue in business?

A. Yes, they needed cash.

Q. I will repeat my question: Can you or not tell me whether or not at the end of 1940 they were desperately in need of a substantial amount of cash?

A. Not any more than they had been in the past.

Q. You mean it was rather customary or habitual for the Merchants Ice & Cold Storage Company to be in desperate need of ready cash?

A. They were always short of cash."

And the balance sheet of December 31, 1940, did not include the butter receipts loss which had to be settled with $22,000 cash shortly after Bercut took over the management, R. 303, 495, 608. Further, we quote Arnold, R. 731:

"A. Well, the Merchants was badly in need of financial assistance, and we were at the end of our rope and we couldn't supply any.

Q. [by Mr. Scampini] You mean you couldn't supply any more capital to the Merchants?

A. No more—no more capital; either the holding company or——

Q. By that you mean the holding company?

A. The holding company. The corporation had done that in previous years, but we were not able to do that any more."

(b) Next, at his page 73, appellant states that "The rest of finding X purports to find facts", etc., some of which findings he then states, but without attacking the sufficiency of the evidence to support them. The facts found clearly show laches, from January 8, 1941, over a period of nearly two years; and they also show *acquies-*

*cence* throughout the same period. Through the years 1941 and 1942, "Maffei and I", testified Arnold, "often commented on how well we heard they were doing", R. 815. Mr. Scampini stated in the course of a colloquy, R. 814, that "as soon as Mr. Peter Bercut got there, who was a competent business man, it became a very fine concern". In other words, they sat by for a couple of years and awaited the event, and then when the danger was over which had been at the risk of Bercut, they sought to come in and share the profit. The law does not permit that. We cite the leading case of *Twin-Lick Oil Co. v. Marbury,* 91 U. S. 587, 23 L. Ed. 328, wherein, with respect to the purchase by an individual director of land of the corporation, the Court said:

> "The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: Badger v. Badger, 2 Wall. 87 [69 U. S., XVII., 836]; Harwood v. R.R. Co., 17 Wall. 78 [84 U. S. XXI., 558]; Marsh v. Whitmore, 21 Wall. 178 [88 U. S. XXII., 482]; Vigers v. Pike, 8 Cl. & F. 650; Wentworth v. Lloyd, 32 Beav., 467; Follansbee v. Kilbreth, 17 Ill. 522.
>
> The cases of Clegg v. Edmondson, 8 DeG., M. & G., 787; Prendergast v. Turton, 1 Younge & C. (Ch.) 98, while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.

> The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would sell for $1000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.
>
> While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

While it is true that what was said in that case about the fluctuating character and value of property relates to oil wells, that portion of the discussion relates only to the element of time in the consideration of laches; and it is to be remembered that in the case at bar we have a corporation that in its losses and earnings fluctuated from a loss of $17,000 in 1939 and a loss of $54,000 in 1940, through a profit of $4000 in 1941 and one of $156,000[20] in

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[20]Bercut testified, R. 387-388:

"Q. [by Mr. Naus] Take the year 1942, the statement here shows that in that year there was an operating profit for

1942. That is high fluctuation and calls for as prompt action by the corporation in any attempt to rescind as was the case in *Twin-Lick Oil Co. v. Marbury,* supra. We need not burden the Court with the many subsequent cases to be found in Shepard's citator, in which the doctrine

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the year of $156,401.98. By the way, that was before the Federal taxes, was it not—that was before the payment of Federal corporation income taxes?

A. Yes, before the Federal.

Q. After the payment of the Federal corporation income taxes on that $156,000 did you not take what was left and use it in order to pay and retire amounts of principal on the bond issue, or else put it back into the buildings in an effort to rebuild the property?

A. That was it.

Q. Since you have taken over the management have either you or your brother taken out a penny by way of salary or compensation or dividends or profit of any kind?

A. No, I didn't think that they could afford it.

Q. And you always put it back and still are trying to rebuild the property?

A. Yes.

Q. And is there still a good deal of that to be done to put it in proper shape?

A. I am spending all of my time working on it."

Gross sales, i.e., gross revenue received from customers in payment of all operations of Merchants Ice, ran as follows:

| Year | Amount |
|---|---|
| 1937 | $436,097 |
| 1938 | 354,688 |
| 1939 | 386,404 |
| 1940 | 371,350 |
| 1941 | 453,599 |
| 1942 | 845,647 |

W. G. Evans, who had been put in by Bercut as manager of Merchants Ice on February 1, 1941, testified, R. 615:

"Q. [by Mr. Naus] Now, as a matter of fact, the year of 1942 ended up with good operating results, largely, did it not, through the practically doubling of the gross business?

A. Yes.

Q. Now, in jumping up the gross business done by the company for the year 1942 to something over $800,000 a year, did or did not Mr. Peter Bercut go out into the trade and bring in new business?

A. Yes, he did."

as to laches in rescinding stated in *Twin-Lick Oil Co. v. Marbury* has been applied. The rule is a well-settled one.

Twenty months elapsed from the transaction in January, 1941, until the board meeting in August, 1942.

At bar, during the twenty months that elapsed after the transaction and after the date that the appellant now concedes Mr. Bercut resigned, Mr. Bercut succeeded in accomplishing a substantial change in the management of Merchants, and a substantial change in its net worth, and a substantial change in the value of the block of Merchants stock. This was not accomplished all at once or over night, but was a slow, laborious and hazardous process and included the loaning of some money by him and his brother to Merchants and the giving of an individual guaranty of $100,000 to a bank, R. 508, to create a new credit for Merchants. While all this was going on, Arnold and Maffei and Pacific Empire Holdings, Inc. stood by and left all the risk and hazard to the Bercuts. In *Alexander v. Phillips Petroleum Co.,* 10 Cir., 130 F. 2d 593, at 605, col. 2, the Court spoke very aptly to such a situation, as follows:

> "A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide, when the danger is over and the risk has been that of another, to come in and share the profit, is obvious. In such circumstances, persons having claims to property are bound to use the utmost diligence in enforcing them.

A substantial increase in the value of the property involved, where the right could have been asserted before such increase and the granting of relief would work inequity, is a circumstance which may be considered in applying the doctrine of laches.

Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced.

Laches will not be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action, and who, therefore, has failed to assert it. But where the facts were known to the plaintiff, ignorance of the law applicable thereto and the consequent ignorance of his legal rights, will not ordinarily excuse delay in asserting the claim."

The Court supported the foregoing statement by an imposing array of authorities from many jurisdictions, including California. The facts of the cases cited by appellant at his pages 74 and 75 are so widely different that they are not in point. Moreover, in each of them the purchasing director remained as a director. At bar, even on the appellant's theory of the evidence, Bercut was not a director after January, 1941. He was a stranger to Pacific Empire Holdings, Inc., during the two years that Maffei and Arnold sat by and observed him and Merchants Ice.

**"Point No. 7."**

At his page 76, appellant appears to complain that Findings XII, R. 953, and XIII, R. 954, are in the form of

legal conclusions as distinguished from ultimate facts. They follow, however, the language in which appellant presented the issue in his complaint, R. 16-18, and are therefore sufficient. As said in *Rauer v. Bradbury,* 3 Cal. App. 256, 260-261, 84 Pac. 1007, 1009, col. 1:

> "For a similar reason the proposition of appellant that the findings are insufficient to support the judgment, upon the ground that the principal finding is merely a conclusion of law and not a finding of fact, is untenable. The finding is a negation in identical language of the allegation of the complaint. The only purpose of findings is to answer the questions put by the pleadings, and if the facts are stated in the findings in the same way that they are stated in the pleadings they are sufficient. Dam v. Zink, 112 Cal. 91, 44 Pac. 331; McCarthy v. Brown, 113 Cal. 15, 45 Pac. 14, and cases therein cited."

**"Point No. 8."**

**(a)** Appellant's principal argument hereunder is that, as stated at his page 79, "the president of a corporation has no authority, *merely by virtue of his office,* to effect a sale of a substantial part of the assets of a corporation". That proposition may be deemed correct, and hence no time need be spent on the many authorities cited by him to that simple and elementary proposition. However, it does not meet the record at bar.

Here, the finding, VII, R. 947, is not merely that Maffei and Arnold acted "merely by virtue of their offices". The finding is that they were "acting within the course and scope of their authority". The record discloses greater authority than mere occupancy of an office. It shows ten years of entire management of the affairs of the Pacific

Empire corporations without meetings being held; a habit of entire management, a continuous course of authority. There is more here than merely the authority of a president ex officio. As said in 6a Cal. Jur. 1152:

> "There is a distinction implicit and not always mentioned between presidential authority and power and managerial authority which the president has when he is the corporation's general manager or executive. Cases holding that the president lacks certain powers do not always mean that as general manager he would lack them. This distinction is expressly recognized by the courts."

And he may be a general manager *de facto, Hoffman v. Guy M. Rush Co.,* 27 Cal. App. 167, 149 Pac. 177. It has been said that he "may be considered as virtually the corporation itself", 19 C.J.S. 99, §756; and at the following page 100 it is said:

> "The office of general manager is of broader import than that of president. The fact that a person having an active conduct of the business of a corporation is also its president does not operate as a limitation on the powers usually exercised by its general agents or managers; his authority is not limited to that possessed by virtue of his office as president but is incidental to the management of the business."

And the case also comes within the rule of authority stated in the Delaware case of *Joseph Greenspon's Sons v. Pecos Valley Gas Co.,* 156 Atl. 350, wherein at pages 352-353 it is stated:

> "A fifth and perhaps the most usual source of the grant of the unusual or extraordinary powers of a President arises by implication of law from a course of conduct on the part of both the President and the

corporation showing that he had been in the habit of acting in similar matters on behalf of the company and that the company had authorized him so to act and had recognized, approved and ratified his former and similar actions.

As said in Stokes v. New Jersey Pottery Co., 46 N.J. Law, 242:

'There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. * * * Thus, when, in the usual course of the business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. * * * These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. * * * In such cases, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing.' ''

It will be seen that that Delaware case, through the principle or rule laid down in the foregoing quoted passage,

supports power or authority exercised by Arnold and Maffei, the executives of the corporation arising from the long course of permitted conduct.

Moreover, in the case at bar the corporation is not of the ordinary type, such as a trading or manufacturing corporation, or the like, where its principal asset is needed in the conduct of its business, but at bar we have a corporation that was organized for the sole purpose of dealing in securities—the dealing in securities was to be, and was, its only and ordinary business and the transaction at bar was nothing more than a dealing in securities.

Furthermore, under the law of Delaware, in effect at the time of this transaction, it will be found that § 9 of the General Corporation Law of Delaware provided:

> "The Board of Directors may, by resolution or resolutions, passed by a majority of the whole board, designate one or more committees, such committee to consist of two or more directors of the corporation, which to the extent provided in said resolution or resolutions or in the by-laws of the corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the by-laws of the corporation or as may be determined from time to time by resolution adopted by the Board of Directors."

In the by-laws of the corporation, in evidence as Plaintiff's Exhibit No. 7, the "Powers of Directors" are stated in Article IV and therein, under the subheading "Delegation of Management," it is stated that

> "The directors shall also have the power to appoint an executive committee to transact the business of the corporation as hereinafter set forth."

Thereafter it is "set forth", in Article VII, under the general heading, "Executive Committee" and subheading "Powers" that

> "Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened."

From the foregoing statute of Delaware and the foregoing quotations of the by-laws, it will be seen that in the management of the affairs of the corporation at bar there was clear authority for an executive committee and that the committee could act informally, i.e., it did not need to convene formally or even to keep informal, or any, minutes of its informal action—the signatures of the executive committee members were sufficient. Moreover, it clearly appears in the testimony of Mr. Arnold that it was a common practice for the executive committee to meet and act informally, R. 827-828, and they never called a meeting in any case when the members of the executive committee signed the papers of a transaction, R. 828.

Again, any "disaffirmance" by the board was required by the by-laws to be "immediate", and not only was there no "immediate disaffirmance" by the board here, but it

did not meet for twenty months after the transaction, i.e., not until August 20, 1942, and the minutes of that date do not disclose a disaffirmance.

Finally, there is the rule of *adoption* of an unauthorized act through inaction over a period of time. At bar, the period is at least twenty months. In the case of *Roth v. Ahrensfeld,* 27 N.E. 2d 445, the question before the Court was whether an unauthorized act of the president of the corporation had been adopted through inaction of the board over a period of eighteen months amounting to an acquiescence in the act. It was held that it did amount to adoption through acquiescence. *Inter alia,* the Court said:

> "Defendant does not deny that its delay in disaffirming should be interpreted as approval, except by its contention that the other officers and stockholders had no knowledge of Jones' transaction during the intervening period. A president is not disqualified from dealing with the corporation he represents, though his contracts with the corporation may be disaffirmed and will be set aside if tainted with the slightest unfairness. Dixmoor Golf Club v. Evans, 325 Ill. 612, 156 N.E. 785. If there is any delay in repudiating, the court will inquire whether avoidance will cause an injustice to any one. Higgins v. Lansingh, 154 Ill. 301, 40 N.E. 362. Although no rights of third persons would be prejudiced, such a contract, nevertheless, will be upheld if by affirmative ratification or by actions amounting to acquiescence the corporation has adopted it. Louisville, New Albany & Chicago Railway Co. v. Carson, 151 Ill. 444, 38 N.E. 140. When the corporation, through its disinterested officers or stockholders, has been completely informed of the contract over a long period of time and has not indicated its disapproval in any way, it may be con-

> cluded that the president's action has been adopted. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 45 N.E. 410, 56 Am.St.Rep. 187; Beach v. Miller, 130 Ill. 162, 22 N.E. 464, 17 Am.St.Rep. 291."

The Courts of California have ruled the same way. In the case of *Brown v. Crown Gold Milling Co.,* 150 Cal. 376, 387, 89 Pac. 86, at 91, a Mr. Doe, as the *de facto* general manager of a corporation, had entered into a contract on behalf of the corporation. It was contended that he had no authority to act but the Court pointed out that after he had made the contract, knowledge that he had done so had come to the attention of a *majority* of the board of directors who "took no measures to disaffirm" the contract and it was held that the corporation was bound by the contract through the inaction of the board, i.e., through the failure to take "measures to disaffirm". We quote:

> "As they [a majority of the board] had such knowledge, it was their duty promptly to disaffirm the action of Mr. Doe, if it was unauthorized. Not having done so, they are deemed in law to have ratified it. The majority of the board having knowledge of the facts, it was not necessary to conclude the corporation in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. Pixley v. W. P. R. R. Co., 33 Cal. 184, 196, 91 Am. Dec. 623; Crowley v. Genessee Mining Co., 55 Cal. 273, 275; Gribble v. Columbus Brewing Co., 100 Cal. 69, 72, 73, 34 Pac. 527; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 Pac. 817."

At bar, the evidence clearly shows that the contract with Mr. Bercut was publicized at the time it was made. And the evidence further shows that at the time the contract was made five of the members of the board of seven knew that it had been made and made no attempt to take any "measures to disaffirm". A recent case showing an application of this rule in California is *Thompson v. M. K. & T. Oil Co.*, 5 C. A. 2d 117 at 123-124, 42 Pac. 2d 374 at 377, where it was held that it is immaterial whether a "legal" meeting was held—that the majority of a board of directors may formally authorize a contract at a formal meeting of the board, or in the alternative there may be no meeting at all, but the contract is equally valid in the absence of a meeting if, when a majority of the members of the board learn about the contract, they take no step whatever to disaffirm it.

And the same result may be reached in our case along a slightly different line. The plaintiff-receiver contends that Mr. Bercut did not resign as a director until January 29, 1941. While we dispute that the resignation was as late as that, we will for the present assume that the resignation did not occur until January 29, 1941. However, *after* that date, i.e., at a time in February, 1941, there was performance and acceptance of performance under the contract and subsequently, in April, 1941, the corporation accepted $3950 from Mr. Henri Bercut in the course of further performance. In such a context our Supreme Court has said:

> "Plaintiff also objects that the oral contracts under which the court found he had been employed were not authorized by resolution of the board of directors. It is well settled, however, that when the

corporation with full knowledge of the contract accepts performance and makes payments on account thereof, there is a ratification of the contract, or an estoppel to deny its validity. Tierney & Lawford, Inc. v. Wilshire Cafe, Inc., 209 Cal. 605, 289 P. 621; Brown v. Crown Gold Milling Co., 150 Cal. 376, 386, 89 P. 86; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 77 P. 817; Pacific Bank v. Stone, 121 Cal. 202, 53 P. 634; 6a Cal. Jur. pp. 1181-1189."

*Berry v. Maywood Mut. Water Co. Number One,* 13 Cal. 2d 185, at 190, 88 Pac. 2d 705, at 708.

As an attempted makeweight to his principal argument under the present heading, appellant at his page 89 in a casual observation (he says, "It is appropriate to observe here") says that the sale to Bercut required consent of a majority of the outstanding stock of Pacific Empire Holdings, Inc., because what was sold to Bercut was *all* of the property of the corporation. The Delaware law provides as follows (General Corporation Law, § 65):

"Sec. 65. Sale of Assets and Franchises:—Every corporation organized under the provisions of this Chapter, may at any meeting of its Board of Directors, sell, lease, or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, and/or other securities of, any other corporation or corporations, as its Board of Directors shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the writ-

> ten consent of the holders of a majority of the voting stock issued and outstanding, provided, however, that the Certificate of Incorporation may require the vote or written consent of the holders of a larger proportion of the stock issued and outstanding."

The Delaware statute is substantially identical with the California statute cited in the following cases: *Shaw v. Hollister Land Co.,* 166 Cal. 257, 135 P. 965; *Baldwin v. American Trading Co.,* 76 Cal. App. 80, 243 P. 710; *Loney v. Consolidated Water Co.,* 122 Cal. App. 350, 9 P. 2d 888; *Boteler v. Bagby,* 14 Cal. App. 2d 139, 55 P. 2d 1207. The type of statute here involved is designed to permit, with the consent of a majority of the shares, the sale of *all* of the assets of the corporation including its good will and its *corporate franchise* and, as held in the preceding cases, is applicable only in the event that the sale includes *all* of the assets of the corporation, including its good will and its corporate franchise. Even though a corporation disposes of all of its physical assets, the consent of shareholders is not necessary and the statute is not violated and action by the board of directors is sufficient, without any action by the stockholders at all.

At the time of the sale of the Merchants stock to Bercut, the corporation owned a 47½% interest in the laundry at Bakersfield and was the owner of 52% of the outstanding stock of Pacific Empire Corporation. The laundry shares were pledged as security for a small obligation and the Pacific Empire Corporation shares were not in pledge at the time of the Bercut transaction. At a subsequent date they were pledged with Kohler & Chase as security for a $13,300 obligation. That the

receiver believed they had substantial value is evidenced by the fact that he paid this obligation and redeemed the shares.

Even if all of the assets of the corporation, including the Merchants shares, were pledged as security for the payment of obligations in excess of their value, it cannot be argued that the corporation owned only the Merchants stock. Its interest in the Pacific Empire Corporation and in the laundry at Bakersfield was a substantial part of its assets and there is no evidence that the stock of Merchants was all, or substantially all, of its assets.

**(b)** Plaintiff's tirade against Bercut at his pages 94 to 101 is merely a transparent effort to ignore the facts found and postulate his ensuing law argument upon the false premises (1) that Bercut was a manager of Pacific Empire Holdings, Inc., (2) that the block of Merchants Ice shares was worth vastly more than $35,000, and (3) that in the negotiations ending in the transaction of January 8, 1941, the selling corporation was *represented* by Bercut as its negotiator. From his false premises he proceeds at length at his pages 101 et seq. into his main cases of *Guth v. Loft, Inc.,* 5 Atl. 2d 503 (affirming 2 Atl. 2d 225), and *Pepper v. Litton,* 308 U.S. 295, 84 L. Ed. 281. Those cases[21] and the others cited by appellant

[21]In *Pepper v. Litton* the corporation's transaction was with one who controlled the voting power of the stock and dominated the board, as a result of which the transaction was held invalid; Litton had simply fixed the paper terms for both himself and his "one-man" corporation. In *Guth v. Loft, Inc.,* Mr. Guth "dominated Loft [the corporation] through his control of the board of directors" (5 Atl. 2d at 506), i.e., the facts show that he represented not only himself on one side but at the same time represented the corporation on the other side.

clearly distinguish. Their sound basis in reasoning has been as clearly stated by the Supreme Court of California as by any Court. In *Smith v. Pacific Vinegar & Pickle Works,* 145 Cal. 352, at 362-363, 78 Pac. 550, 552-553, the Court said:

> "This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself. In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors, or with other agents thereof. He was dealing with himself, contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to, or contract of indorsement thereof, with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in *Mercantile Mut. Ins. Co. v. Hope Ins. Co.,* 8 Mo. App. 411, may pertinently be applied: 'A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent'. In Clark & Marshall's Private Cor. vol. 3, § 759, the rule is concisely summed up in this language: 'A

> person cannot, as director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation, on one side, and for himself on the other, can make no difference'."

The rule was put in a nutshell in *Pepper v. Litton,* supra (308 U.S. at 306-307):

> "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's-length bargain."

Here, Finding VII, R. 947-948, is that the "agreement of sale * * * was entered into in good faith after lengthy negotiations, at arm's length, by and between the said corporation acting through independent and disinterested officers and directors and the said Peter Bercut, and upon a full disclosure of all facts relating thereto". That brings the facts into a different line of authority, to which we turn:

As said in *Morawetz* on *Private Corporations* (2d ed.), § 527:

> "The incapacity of the agents of a corporation to bind it by making contracts with themselves personally, rests solely on the principles of the law of agency. There is no arbitrary rule of law prohibiting contracts between a corporation and its agents, where these principles have no application. Thus, if an agent does not assume to represent the corporation in entering into a contract with it, but deals with another independent agent, who has authority

> to act for it, the transaction will be unobjectionable * * * There is no necessary impropriety in a contract between a director and the corporation, if the latter is represented by other agents. On the contrary, such contracts are, in many instances, the natural result of circumstances, and are justified by the approved usages of business men."[22]

A leading American case is *Twin-Lick Oil Co. v. Marbury,* 91 U.S. 587, 23 L. Ed. 329. There, the purchase by a director of an asset of the corporation was sustained; he was, said the Court, but "one director among several" and he had no domination or control of the board. In *Smith v. Pacific Vinegar Works,* supra, it was said (145 Cal. 352, 367, 78 Pac. 550, 554-555):

> "This marked distinction is plainly declared in a line from one of the cases cited by respondent (Lick Oil Co. v. Marbury, 91 U.S. 590) where the court says, 'The defendant was not here both seller and buyer'."

The authorities are collected and their result stated in 3 *Fletcher, Corporations,* § 931. In 14a *C.J.* 118 (note 31) and 19 *C.J.S.* 151-152 (note 17) the rule with respect to the validity of transactions with directors when the corporation is represented "by **independent** officers or agents" is stated and many authorities collected thereunder. In 6a *Cal. Jur.* 1116 it is said:

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[22]As said the other day in *Okin v. Securities and Exchange Commission,* 2 Cir., 137 F. 2d 398, 401, col. 2:

> "Indeed, from National's [the corporation's] standpoint, it would seem most natural to dispose of the investment to those most interested; that would be where the best price might well be found."

"A distinction is made between cases where an officer of the corporation as such deals with himself in an individual capacity concerning corporate property without the knowledge and consent of the corporation or its stockholders, and those cases in which such officer consummates a transaction in his individual right with the consent of the corporation and without having himself taken part as an officer in the transaction. Thus, where the corporation is represented by its general manager, and the transaction is free from fraud, the fact that the party dealt with is a director does not render the contract void without regard to actual fairness or unfairness. The rule that where an officer deals with the corporation it is a violation of his trust, applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction, and where his official action is an essential part of the corporate action."

**(c)** At his pages 115 et seq. appellant argues that the transfer of the shares was fraudulent as to creditors, and he lays his argument on California Civil Code, §§ 3439.04 and 3439.07. The latter relates to an actual intent to defraud creditors, and the former makes a conveyance fraudulent without regard to intent if *thereby* the transferror is rendered insolvent, or if the conveyance is made "without a fair consideration". Neither of the Code sections applies in view of Finding IX, R. 951, which reads:

"The sale of said shares of Merchants Ice & Cold Storage Company, as aforesaid, did not render Pacific Empire Holdings, Incorporated insolvent or unable to meet its debts or other obligations and was

> not in fraud of its stockholders and creditors or its stockholders or creditors. The financial condition of said corporation was due to causes other than the sale of said shares."

And Finding VII, R. 948, that $35,000 "was a fair, reasonable and proper price for said shares", and they "were reasonably worth a sum not in excess of $35,000". Those findings being clearly supported by the evidence, the argument of appellant is without basis in the record.

A consideration is a "fair consideration" if it is "a fair equivalent", *Calif. Civil Code,* § 3439.03. It has been said that " 'Fair consideration' means a consideration which under all the circumstances is honest, reasonable and free from suspicion, whether or not strictly 'adequate' or 'full' ", *Ferguson v. Dickson,* 3 Cir., 300 Fed. 961, 964. At bar, the consideration was more than merely "fair"; it was adequate and full.

**"Point No. 9."**

Under the preceding "Points" the sufficiency of the evidence to support the findings has been discussed. The present Point No. 9 appears to confuse the situation. It cannot be doubted that the facts found support the conclusions of law and the judgment. If it is the thought of appellant that, in a case where the facts are specially found, he may nevertheless attack the *judgment* for insufficiency of evidence, he is answered by *Hayne, New Trial and Appeal* (rev. ed. 1912), § 96, where it is said:

> "It is not the judgment, but the verdict or decision of facts, against which the attack should be directed. It is inexact to say, that the judgment is

not supported by the evidence. The judgment rests upon the verdict or findings, and the verdict or findings upon the evidence. The judgment may be supported by the verdict or findings, which may be entirely unsupported by the evidence, and *vice versa.*''

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**CONCLUSION.**

On January 8, 1941, the date of the Bercut purchase, the Merchants Ice was an insolvent concern. For ten years, ending December 31, 1940, it had lost money in every year and its aggregate operating deficit for the ten years totaled $543,501.35. Its real estate taxes were in default and unpaid; the corporation had insufficient funds with which to pay wages; the Pacific Gas & Electric Company was unpaid; and it had no cash and no credit and its affiliated corporations had neither cash nor credit. It was faced with a claim of the Bank of America in the amount of $38,000. Without immediate and substantial support and managerial change, which would create confidence in the customers of the Merchants, the Merchants Ice was doomed and not only would there have been nothing for the stockholders, but the creditors would not have been paid in full. The corporation was rehabilitated upon a pledge of Bercut's individual credit in the amount of $100,000 and upon a pledge of his reputation and ability to operate the corporation as a going concern. Without the transaction, the stock was worthless. We might here state that what the appellant here is attempting is what Mr. Arnold had in mind when he testified that when he and Mr. Maffei learned of the suc-

cess of Bercut they thought it would be a very good thing if they could once again obtain a position in the company. It is not going too far to say that Mr. Scampini had the same idea and that he could now see sufficient assets, quoting him, "to pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders". At the time of the transaction Mr. Bercut was not a director of Pacific Empire Holdings, Inc.; he was not the manager of that corporation; he dealt at arm's length with the managers of it and it was represented independently in the negotiations by them; and the price paid was all that the block of shares was then worth. Nearly two years went by before it occurred to Maffei or Arnold to attack the transaction, and when they finally did attack it they assumed the guise of co-defendants in the course of a stratagem to deflect a threatened attack upon them based generally on matters other than the transaction with Bercut.

The case comes to this Court with full, fair and clear findings that are well supported in the evidence, and the judgment should be affirmed.

Dated, San Francisco, California,
February 4, 1944.

Respectfully submitted,
George M. Naus,
Louis H. Brownstone,
*Attorneys for Appellees*
*Peter Bercut and Henri Bercut.*